

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D. C. 20426

May 28, 2004

In Reply Refer To:
Midwestern Gas Transmission Company
Docket No. RP04-266-000

Midwestern Gas Transmission Company
P. O. Box 542500
Omaha, Nebraska 68154-8500

Attention: Raymond D. Neppl, Vice President
Regulatory Affairs & Market Services

Reference: Right of First Refusal Tariff Change to Add Evergreen Clause

Ladies and Gentlemen:

1. On April 27, 2004, Midwestern Gas Transmission Company (Midwestern) filed tariff sheets¹ revising section 16.2 of its General Terms and Conditions (GTC) to resolve inconsistencies between its tariff and eighteen non-conforming agreements. The filing includes the eighteen agreements with related tariff sheets to update Midwestern's list of non-conforming agreements pursuant to section 154.112(b) of the Commission's Regulations.² Midwestern proposes to revise section 16.2 of its GTC to provide eligible shippers with the evergreen clause contained in these agreements in addition to the right of first refusal (RFOR) rights already provided by section 16. The evergreen clause automatically extends a qualifying contract for five-year successive terms unless the shipper tenders one-year's prior notice to terminate or elects a term less than five years.³ Midwestern therefore requests that the tariff sheets become effective on June 1, 2004.

¹ Fourth Revised Sheet No. 247, Ninth Revised Sheet No. 273, and Original Sheet No. 273A to FERC Gas Tariff, Third Revised Volume No. 1.

² Section 154.112(b) requires pipelines to file service contracts that deviate in any material aspect from the form of service agreement in its tariff, and to reference them in its FERC Gas Tariff.

³ Section 16.1 of Midwestern's GT&C defines a "qualifying agreement" eligible for a ROFR as a long term firm service agreement at the applicable maximum rate or a long term firm service agreement entered into prior to March 27, 2000, unless Midwestern and the shipper agree otherwise.

2. The Commission accepts Fourth Revised Sheet No. 247 revising Midwestern's ROFR tariff provisions to become effective June 1, 2004, subject to Midwestern filing the revisions discussed below within 30 days from the date this order issues. Because Fourth Revised Sheet No. 247 incorporates the non-conforming language in the subject eighteen contracts into a generic provision, these contracts will no longer be non-conforming and the proposed changes to the list of non-conforming contracts referencing the eighteen contracts in the tariff is not necessary. For this reason, Ninth Revised Sheet No. 273 and Original Sheet No. 273A are dismissed as moot. This order benefits the public because it ensures that Midwestern's tariff contains language that authorizes the evergreen clauses contained in the eighteen agreements at issue here.

3. The filing was noticed on April 30, 2004, permitting comments, protests or interventions as provided in section 154.210 (18 C.F.R. § 385.214 (2003)) of the Commission's regulations. Pursuant to Rule 214 (18 C.F.R. § 385.214 (2003)) all timely filed motions to intervene and any motions to intervene out-of-time filed before the date this order issues are granted. ProLiance Energy, LLC, a party to two of the non-conforming contracts filed a motion to intervene. The Peoples Gas Light and Coke Company (Peoples) and Nicor Gas filed the protests discussed below.

4. Section 16 of Midwestern's tariff presently contains three sections dealing with its ROFR. Section 16.1 defines the qualifying agreements to which the balance of the section 16 applies. Section 16.2 contains two paragraphs. The first paragraph states that a shipper holding a qualifying agreement may exercise a ROFR pursuant to the procedures set forth below in the tariff. The second paragraph states that contracts at less than the maximum rate, or with a term of less than one year, are not eligible for a ROFR unless Midwestern agrees. Section 16.3 provides that if a shipper with a qualifying agreement elects to extend its agreement for less than one year, then Midwestern will either accept this lesser extension or post the capacity for third party bids 180 days before the existing contract terminates and give the existing shipper a ROFR.

5. In the instant filing, Midwestern identified eighteen agreements containing language in Article XII "Term of Agreement" which differs from the language in its pro forma firm gas transportation agreement. According to Midwestern, at the time the agreements were executed, its current operator Northern Plains Natural Gas Company (NPGP) was not the operator of Midwestern,⁴ and for reasons unknown, the ROFR terms of the agreements contain language from GT&C subsection 10.4.2 under Tennessee Gas Pipeline Company's (Tennessee) FERC Gas Tariff.

6. Midwestern states that the non-conforming contract language at Article XII provides that, if the agreement is for long-term firm service, the contract term will automatically roll-over for additional five-year increments unless the shipper provides

⁴ The agreements were executed from August 1993 to April 2001. NPNG became the operator of Midwestern on May 1, 2001.

one-year written notice to Midwestern prior to the expiration of the contract to either terminate the contract in whole or in part, or to exercise its ROFR in accordance with Midwestern's ROFR tariff provisions at GT&C section 16. Midwestern proposes to remedy the absence of the evergreen language in its tariff by adding the following language at GT&C section 16.2 to its ROFR tariff provisions:

Company shall provide notice to a Shipper receiving service from Company pursuant to Part 284 of the Commission's regulations under a qualifying agreement thirteen (13) months prior to the expiration of the agreement's primary term. Unless Shipper then elects upon one year's prior written notice to Company to terminate the agreement or to request a lesser extension of term, the agreement will automatically extend upon the expiration of the primary term for a term of five years. Thereafter the agreement shall repeatedly extend for successive five year terms unless Shipper provides notice as described above in advance of the expiration of a succeeding term.

Since Midwestern's service agreements incorporate the terms and conditions included in its tariff, Midwestern's proposed revisions to section 16.2 will give all eligible long-term shippers the same evergreen clause as currently exists in the 18 non-conforming contracts.

7. Peoples and Nicor Gas object to the automatic five-year successive extensions, absent the shipper giving one-year notice of termination or request for a shorter extension, as inconsistent with Midwestern's existing ROFR provisions. They argue that Midwestern's ROFR provisions are similar to many other pipelines' ROFR conditions providing for a posting, bidding and matching process, and providing for shorter notice periods. Peoples' principal objections to the proposal are that: (i) it is inconsistent with how most pipelines conduct business;⁵ and (ii) the price of inaction (i.e., inadvertence or error on a shipper's part) is a five-year service commitment for capacity that the shipper may not need for that or any other term. Peoples states that the automatic five-year renewal terms based on its silence is punitive. As such the proposed provision is unreasonable and is likely not a provision that it would accept in arms length negotiations absent consideration.

8. Nicor Gas also requests investigation of Midwestern's proposal through a technical conference. In general, Nicor Gas contends that it is more appropriate for Midwestern either to modify the terms of the nonconforming agreements rather than the tariff applicable to all shippers, or for the Commission to accept these agreements and require Midwestern to ensure that these nonconforming provisions are not included in any future shipper agreements. Nicor Gas also wishes to clarify that it assumes that

⁵ Peoples recognizes that Tennessee, formerly an affiliate of Midwestern, has such an automatic rollover in its tariff.

if a shipper elected to terminate its agreement or Midwestern rejected its offer to extend its agreement for a less than five year term at a maximum or discount rate, the shipper would automatically enter the ROFR process.

9. The Commission accepts Midwestern's proposed changes to section 16.2 of its GTC subject to two conditions. First, as requested by Nicor, Midwestern must clarify that a qualifying shipper will enter the ROFR process set forth in section 16.3 of its GT&C if the shipper terminates the contract completely, or if Midwestern rejects its request for a contract extension of less than five years or for a contract at less than the maximum rate. Second, as discussed below, Midwestern must reduce the notice period for contracts with terms of less than five years. With these latter qualifications, we find that the proposed five-year automatic contract renewal subject to a one-year prior notice requirement gives the shipper an additional contract extension option that does not compromise the basic ROFR rights available under Midwestern's current firm contracts. As stated by Peoples, the evergreen clause at issue here does "not change the conditions under which service is provided and do[es] not present a risk of undue discrimination. [footnote omitted]".⁶ We further find that the evergreen clause and the accompanying notice provision which Midwestern proposes to include in its tariff is no different than the one in Tennessee's tariff that the Commission has approved as just and reasonable.

10. For the same reasons, the Commission rejects the request to modify the existing contracts because this would require the Commission to modify the contracts under section 5 of the Natural Gas Act, and would deprive the relevant shippers of a valuable evergreen right. Granting the request would call into question the reasonableness of Tennessee's tariff and its contracts containing the concept.

11. However, our review of the eighteen contracts shows that two of the contracts (Nos. FA0001 and FA0002) with primary terms extending from September 1, 1993 to November 1, 1995 only required the shipper to provide Midwestern written notice six months prior to the contract expiration date.⁷ To assure that all other shippers will have the benefit of such terms, Midwestern must revise section 16 to provide its current shippers a similar prior notice period for contracts with terms extending for more than one year and less five years. We therefore direct Midwestern to revise its proposed ROFR tariff provisions consistent with the discussion in this order such that the contract ROFR conditions do not constitute material deviations or negotiated terms and conditions of service.

⁶ Citing ANR Pipeline Company, 104 FERC ¶61,134 (2003) at P 27.

Likewise, Peoples contends that the clause does not result in the shippers to the non-conforming agreements receiving "a different or better quality of service than other shippers on the system." Citing ANR Pipeline Company, 101 FERC ¶61,094 (2002) at P 5.

⁷ The contract terms under the two contracts were based on a Tennessee restructuring cost settlement in Docket No. RP93-151-000, et al.

12. Peoples also contends that the proposal is contrary to Midwestern's capacity allocation procedures, and Midwestern's current FT-A form of service agreement (FTA), which provides for only a month-to-month extension after the primary term. Peoples is incorrect as the FTA does not give the shipper a unilateral right of extension since either party can terminate the contract on one month's notice. Peoples and Nicor Gas also note that Midwestern's proposal does not address ROFR conditions for renewal of contracts at a less than one-year term at a maximum rate or discounted rate. These concerns are not relevant to the instant problem and are addressed by section 16.3 of the tariff. Further, Nicor Gas expresses concern that the thirteen months advance notice simply does not work if the contract has only a one year term. We have addressed that concern by requiring Midwestern to shorten the notice period for contracts of less than five years.

By direction of the Commission. Commissioner Kelly not participating.

Magalie R. Salas,
Secretary.

cc: All Parties